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In The

Supreme Court of the United States

October Term, 1988

LEUCADIA, INC.,

Petitioner,

vs.

RELIANCE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari on the question of whether an asserted error in jury instructions may be held harmless, where petitioner's claim under two fidelity bonds that respondent's principal committed acts of dishonesty and fraud in performing his duties as petitioner's employee, was without evidentiary support and did not rise to the level of proffering a credibility issue for the jury to determine, to the point where the action should have been dismissed prior to its submission to the jury?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Leucadia, Inc. ("Leucadia") presents a garden variety failure of a plaintiff to establish the elements of a *prima facia* case, suggesting that issues of credibility are at stake. The reality is that despite a gargantuan crusade on Leucadia's part that exacted a tremendous toll on the courts and the parties over

the course of eight years of discovery and a trial lasting almost four weeks, Leucadia did not even come close to meeting its burden of proof by any standard. The attempt to transmute its own egregious failure of proof into a judicial lapse of constitutional proportions is but a desperate, last ditch gambit to revive a moribund claim. As the Court of Appeals held unanimously, this lawsuit was destined for failure as a matter of law regardless of the niceties of the jury charge that the Court employed.

Leucadia lodged a claim for recovery under two fidelity bonds issued by the respondent Reliance Insurance Company ("Reliance"). The claim asserted that Reliance's principal, Edward Helmke ("Helmke") committed dishonest or fraudulent acts while in petitioner's employ as head of its mortgage loan department.

The bonds at issue contain the following language:

> Dishonest or fraudulent acts as used in this insuring agreement shall mean only dishonest or fraudulent acts committed by such employee with the manifest intent:
>
> a. to cause the insured to sustain such loss; and
>
> b. to obtain financial benefit for the employee.
>
> or for any other person or organization intended by the employee to receive such benefit, other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment.

* * *

> Dishonest or fraudulent acts as used in this Insuring Agreement shall mean only dishonest or fraudulent acts committed by such Employee with the manifest intent:
>
> (a) to cause the Insured to sustain such loss; and
>
> (b) to obtain financial benefit for the Employee, or for any other person or organization intended by the Employee to receive such benefit. . .

Leucadia's claim of fraudulent and dishonest conduct hinged on the sole premise that Helmke made improper loans to three individuals: Silverman, Suson and Duddlesten. The record is clear, however, that in each instance, the transactions were not dishonest or fraudulent acts within the meaning of the bonds. They were consistent with Leucadia's own objectives to maintain values on real estate mortgage holdings and thereby to prevent a default under the credit agreement with a consortium of banks by which Leucadia was bound to maintain a significant net worth. They were also approved by Helmke's superiors and otherwise sanctioned by Leucadia's own policies and business interests as they were then being implemented by Leucadia's own business organization at large.

Leucadia's own witnesses established that Helmke's actions were the same as those taken by his predecessors and successors and that they were largely negotiated and approved by Helmke's superiors. In the case of the Suson loans, for example, the alleged losses were occasioned by forgeries perpetrated by Suson himself in releasing security held by Leucadia to secure certain loans. After the forgeries were discovered, Leucadia compromised the ensuing claim against a title company and thereby generated its own

damages. The loans to Silverman did not cause any loss since the properties securing those loans were sold at ample returns which negated the claimed loss. Helmke's representation to the senior credit committee that one of the Duddlesten loans would be secured by a security interest in Duddelsten properties was nothing but "an expectation which was not realized, made without any intent to deceive or defraud Leucadia." (Pet. App. A22).

The Court concluded:

> [T]he record fails to show that Helmke committed any acts of dishonesty with the "manifest intent" either "to cause the insured to sustain (a) loss" and "to obtain financial benefit" for himself or for others even under the preponderance of the evidence standard. We find that Reliance has met its burden of showing that the error made no difference.
>
> * * *
>
> Leucadia's losses were . . . due in part to the depressed market conditions, in part to Leucadia's internal disorganization and in part to the mismanagement of its accounts and its failure properly to supervise its employees.
>
> Furthermore, there is no evidence Helmke intended to benefit himself or others by continuing to advance money to borrowers in arrears. (Pet. App. A19-A20).

The Court summarized its conclusion as follows:

> In sum, we are convinced beyond a reasonable

doubt that no reasonable jury could have found that there was a preponderance of the evidence to show that, during the bond period, Helmke had committed any dishonest acts which caused a loss to Leucadia. (Pet. App. A19, A20, A23, as amended, A25).

Contrary to Leucadia's claim, the Court of Appeals did not appropriate issues of credibility from the jury. Viewed objectively, Helmke's actions were honest. Petitioner's contrary interpretation amounts to speculation and surmise. It was therefore proper for the Court of Appeals to apply a harmless error standard in assessing the impact of the District Court's failure to instruct the jury to apply the preponderance standard to determine if petitioner had met the burden of establishing dishonesty on the part of Helmke.

Indeed, in light of Leucadia's arrant failure of proof as to either element, dishonesty or fraud, the District Court obviously would have been justified to grant Reliance's motion to dismiss the action altogether without submitting it to the jury at all and, indeed, should have done so. The District Court's reluctance to direct a verdict — apparently in light of the substantial investment of judicial resources in the four week trial — is no indication that there was an issue for the jury to determine and hence, no federal constitutional error vis-a-vis Leucadia's right to a jury trial is presented.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONSTITUTIONAL OR OTHER INFIRMITY IN THE COURT OF APPEALS' AFFIRMANCE OF THE JUDGMENT SINCE PETITIONER FAILED TO PROVE FRAUD OR DISHONESTY.

Leucadia's attempt to enshroud this diversity action with constitutional importance is truly fallacious. The argument that the Seventh Amendment guarantee of jury trial has been trifled with is misplaced.

Boyle v. United Technologies Corp., ____U.S.____, 108 S. Ct. 2510 (1988), with which the view of the Court of Appeals expressly conforms (Pet. App. A25), itself dispenses with Leucadia's argument. There, it was argued that "since the formulation of the defense adopted by the Court of Appeals differed from the instructions given by the District Court to the jury, the Seventh Amendment guarantee of jury trial required a remand for trial on the new theory." This Court stated:

> We disagree. If the evidence presented in the first trial did not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for the respondent at once, without a new trial. (*Id.* at 2519.)

Leucadia cites *Liberty National Bank v. Aetna Life & Casualty Company*, 568 F. Supp. 860 (D.N.J. 1983) as a similar case involving an allegedly dishonest employee's fraud. Suffice it to state that *Liberty* is replete with genuine issues of material fact concerning the employee's knowledge of his restricted lending

authority, his falsification of the minutes of board meetings, his deliberate lies and his failure to make various disclosures to his superiors.

It is commonplace that:

> Errors in instructions routinely are ignored if a motion for a directed verdict should have been granted, or if the erroneous instruction went to an issue that is immaterial in the light of the jury's verdict, or if it otherwise is apparent that the error could not have changed the result. (Wright & Miller, Federal Practice and Procedure: Civil § 2886.)

There is no need for this Court to revisit this fundamental and oft-repeated principle: Where a plaintiff-appellant failed to carry its burden of proof, *i.e.*, the state of the evidence is such that a directed verdict against the appealing party would have been proper, an erroneous instruction constitutes harmless error. *Prebble v. Broderick,* 535 F.2d 605 (10th Cir. 1976); *Vecchio v. Anheuser-Bush, Inc.,* 328 F.2d 714, 719 (2d Cir. 1964), *cert. denied,* 379 U.S. 831, 85 S. Ct. 60 (1964). ("Thus, despite the incorrect charge given to the jury when they found for defendant, the judgment entered below for defendant must be affirmed because the lower court should not have submitted the case to the jury at all but should have granted defendant's motion for directed verdict."). *Harris v. Quinones,* 507 F.2d 533 (10th Cir. 1974).

It is well settled, also, that an erroneous instruction dealing with the burden of proof to establish fraud constitutes harmless error where the evidence is insufficient to prove fraud. *L & S Enterprises Co. v. Great American Insurance Co.,* 454 F.2d 457 (7th Cir. 1971). Even an erroneous denial of a jury trial is harmless

error where the evidence is insufficient to establish the elements of a *prima facie* case. *United States v. Williams,* 441 F.2d 637 (5th Cir. 1971). "There is no consitutional right to have twelve men sit idle and functionless in a jury box." *United States v. 243.22 Acres of Land,* 129 F.2d 678, 684 (2d Cir. 1942), *cert. denied,* 317 U.S. 698 (1942).

Indeed, so weak was Leucadia's proof that it must be assumed that the trial court refrained from granting Reliance's motion for a directed verdict, only in deference to the Court of Appeals' admonition in *Konik v. Champlain Valley Physicians Hospital,* 733 F.2d 1007, 1013 n.4 (2d Cir. 1984) and *Mattiui v. South African Marine Corp., "Huguenot",* 618 F.2d 163, 166; n.2 (2d Cir. 1980). In *Konik*, after the trial of an action that consumed nearly four weeks, as did the trial of the present action, the trial judge was admonished that it should have allowed the case to be decided in the first instance by the jury, only for him to set aside the verdict of the jury in the event the jury did not find in favor of the defendant. In this manner, the trial judge can avert a needless retrial in the event the Court of Appeals does not affirm the judgment based upon a directed verdict. Clearly, the trial judge in the present case was unwilling to grant Reliance's motion for a directed verdict only because he was adhering to this recommended practice and not because there was an issue of fact for the jury to decide. Undoubtedly, if the jury verdict would have been in Leucadia's favor, the trial judge would have properly set it aside.

Leucadia would have this Court re-examine facts already scrutinized so carefully by the Court of Appeals below. The arguments tendered for certiorari are without merit. Certiorari should not be granted simply to give Leucadia what will amount to yet another evidentiary appraisal of its stale vendetta against a former employee which has for so long plagued our judiciary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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